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Nos. 84-871, 84-889, 84-1054 and 84-1069

IN THE

Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, et al.,
Appellees

(and three related cases)

ON APPEAL FROM, AND PETITIONS FOR A WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GTE'S BRIEF IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Was the Federal Communications Commission acting within the scope of its authority and rationally exercising its expert judgment when, based on (i) the express mandate of Congress contained in Section 220 of the Communications Act, 47 U.S.C. § 220, and (ii) the need to prevent state action interfering with the accomplishment of federal policies and objectives, the agency concluded (a) that its depreciation policies and rates preempt inconsistent state depreciation policies and rates, and (b) that telephone plant used for both interstate and intrastate communication must be depreciated in accordance with FCC prescriptions?

ADOPT CONSOLIDATED MOTION

GTE adopts in all respects the Consolidated Motion to Dismiss or Affirm and Brief in Opposition to Petitions for Certiorari filed jointly by American Telephone and Telegraph Company (AT&T) and various other industry parties supporting the Commission (herein "the Consolidated Motion"). The instant brief is submitted to complement the facts and legal analysis contained in the Consolidated Motion.

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TABLE OF AUTHORITIES

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This brief is submitted on behalf of GTE Service Corporation and its affiliated domestic telephone operating companies (herein "GTE"),[1] which were parties supporting the Appellee-Respondent Federal Communications Commission in the court below. This brief demonstrates that the various petitions for certiorari should be denied and the appeal should be dismissed or the lower court's decision summarily affirmed.

The Fourth Circuit affirmed the FCC in its decision that, under the Communications Act of 1934 as amended, 47 U.S.C. § 151 *et*

1. GTE Service Corporation is a wholly-owned subsidiary of GTE Corporation. In compliance with the Court's Rule 28.1, a complete list of all subsidiaries of GTE Corporation is contained in Appendix 1 to this brief.

seq. (herein "the Communications Act"), the depreciation prescriptions issued by the FCC preempt inconsistent state-ordered depreciation policies and rates. *Virginia State Corporation Commission* v. *FCC*, 737 F.2d 388 (4th Cir. 1984) (herein "VSCC"), *aff'g Amendment of Part 31*, 92 F.C.C.2d 864 (1983) (herein the "*1983 Preemption Order*"). An appeal (No. 84-871) was filed by the Louisiana Public Service Commission (herein "Louisiana"); petitions for certiorari were filed by (No. 84-889) the People of the State of California and the Public Utilities Commission of the State of California, the National Association of Regulatory Utility Commissioners (herein "NARUC"), and the regulatory commissions of several other states (collectively referred to herein as "California"), California being supported by an *amicus curiae* brief submitted by the State of Maine and the Maine Public Utilities Commission (herein "Maine"), by (No. 84-1054) the Public Utilities Commission of Ohio (herein "Ohio"), and by (No. 84-1069) the Florida Public Service Commission (herein "Florida"). All such appealing, petitioning and *amicus* parties are referred to collectively herein as "the states."

STATEMENT OF FACTS

The GTE telephone companies, including General Telephone Company of Ohio (GTE of Ohio), were parties to the proceedings before the FCC. GTE of Ohio, and a number of other GTE companies, are fully subject to Title II of the Communications Act, 47 U.S.C. § 201 *et seq.*, in accordance with the provisions of Subsection 2 of the Act, 47 U.S.C. § 152.

After noting that the record indicated a differential for GTE of Ohio of seven million dollars a year in depreciation between levels prescribed by the FCC and those established by the Ohio Public Utilities Commission (*1983 Preemption Order*, 92 F.C.C.2d at 878-879, App. at A-48-49),[2] the FCC concluded that its depreciation policies and rates preempt inconsistent state depreciation policies and rates. As exemplified by this seven million dollar figure, the consequences of such inconsistencies, absent FCC preemption, can place serious risks on the firm caught between the two sovereigns. The record before the FCC showed that use of different methodologies and rates for interstate and intrastate purposes would mean that *the same item of plant* would be depreciated differently (for example, different lives), so that a portion of the plant investment might remain on the books for state purposes when it has been fully depreciated for FCC purposes, or vice versa. Further, the record showed that only sheer chance would produce matching figures in plant accounts for any particular period; and that, under these circumstances, there could be no assurance aggregate revenues generated under federal and state regulation would cover these varying depreciation accruals. *See* Appendix 2, First Excerpt (at 2-1) and Second Excerpt (at 2-3). The FCC concluded, on the basis of its extensive factual record, absent FCC preemption "improper capital recovery could ... ultimately, threaten carriers' ability to fully recover their invested capital." *1983 Preemption Order*, 92 F.C.C.2d at 877, App. at A-46.

SUMMARY OF THE ARGUMENT

The FCC's carefully limited preemption here comes squarely within the standards applied to FCC preemption by this Court and four Circuit courts. Further, the FCC's action is a faithful implementation of explicit Congressional intent. Well-supported findings of the expert agency and the Fourth Circuit justify the *1983 Preemption Order* and *VSCC*. No basis for plenary review has been established. Accordingly, this Court should dismiss the appeal in No. 84-871, or summarily affirm the lower court's decision; and should deny certiorari in Nos. 84-889, 84-1054 and 84-1069.

2. Page references in this brief, shown as "A-1", "A-2", etc., are to the Louisiana Appendices (No. 84-871). This paging also corresponds to that of the Ohio Appendices (No. 84-1054), for those documents therein contained. Page references to the GTE Appendices are shown as "1-1", "1-2", etc.

ARGUMENT

THE STATES HAVE FAILED TO SHOW THAT PLENARY REVIEW IS WARRANTED.

I. The scope of the FCC's preemptive action is carefully limited.

Contrary to the states' assertions, the FCC did not preempt the ratemaking process at the state level. Rather, the FCC was careful to limit its preemption within the scope of both established case law and the terms of its governing federal statute. Executing the explicit direction of Congress expressed in Section 220 of the Communications Act, 47 U.S.C. § 220, and deeming it necessary to achieve the statutory goal of an efficient nationwide telecommunications service, the Commission decided to fix one element in the ratemaking calculation: depreciation of plant used jointly for interstate and intrastate communications. "The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process." *1983 Preemption Order*, 92 F.C.C.2d at 874, App. at A-41. All other elements of the process remain in the hands of state regulatory agencies.

II. The states' arguments against FCC preemption simply ignore the legal principles applied by the courts.

To an astonishing degree, the Jurisdictional Statement and petitions of the states simply ignore the legal principles governing FCC preemption established by numerous decisions of Circuit courts and of this Court. Refusal to recognize the preemption doctrine applied by the federal courts in an FCC context forms the basis for the states' claims of a federal over-reaching. The following brief review of this doctrine, with special reference to Subsections 2(b) and 221(b) of the Communications Act, 47 U.S.C. §§ 152(b) and 221(b), will provide a framework[3] for examining the states' arguments:

> *First*, Congress gave the FCC "unified jurisdiction," "broad authority," and "a comprehensive mandate," with "not niggardly but expansive powers."[4]
>
> *Second*, the FCC's authority embraces not only its responsibilities explicitly assigned by the Act, but also that which is "reasonably ancillary" to the effective performance of its statutory responsibilities.[5]
>
> *Third*, the scheme of dual federal and state regulation that underlies the Act grants the FCC jurisdiction over *all* interstate (and foreign) communication by wire or radio; this embraces facilities used for both interstate and intrastate communications.[6]
>
> *Fourth*, the nature of the communication itself rather than the physical location of the technology determines whether interstate or intrastate communication is involved.[7]
>
> *Fifth*, notwithstanding Section 2 of the Act, FCC jurisdiction embraces communications facilities that are not

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3. *See generally McKenna, Pre-Emption under the Communications Act*, 37 FED. COMM. L. J. 1, 53 *et seq.* (1985). The author is Counsel of Record for GTE.

4. National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); United States v. Southwestern Cable Co. ("*Southwestern Cable*"), 392 U.S. 157, 172-173 (1968). *See also* Capital Cities Cable, Inc. v. Crisp ("*Capital Cities*"), 104 S. Ct. 2694, 2701 (1984).

5. *Capital Cities*, 104 S. Ct. at 2701; United States v. Midwest Video Corp. ("*Midwest Video*"), 406 U.S. 649, 663 (1972), *reh'g denied*, 409 U.S. 898 (1972); *Southwestern Cable*, 392 U.S. at 177-178; Permian Basin Area Rate Cases ("*Permian Basin*"), 390 U.S. 747, 780 (1968).

6. *Southwestern Cable*, 392 U.S. at 173. "[F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." General Tel. Co. of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969) (Burger, J.), *cert. denied*, 396 U.S. 888 (1969).

7. *Id.* at 168-169; *Midwest Video*, 406 U.S. at 663 n. 32. "*Every court that has considered the matter* has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used." *NARUC v. FCC, infra*, 746 F.2d at 1498, *emphasis added.*

separable from, or that substantially affect, the conduct or development of interstate communications.[8]

Sixth, Congress may have intended to deny the FCC the kind of jurisdiction over local rates approved in the *Shreveport Rate Case*,[9] but in no other respect did Congress distinguish between FCC authority over rates and over other aspects of communications. *See CCIA* v. *FCC*.[10]

Seventh, while, as a practical matter, intrastate ratemaking has typically been treated as "separable" from interstate ratemaking (*North Carolina I*, 537 F.2d at 793 n.6), FCC preemption will be upheld where intrastate ratemaking substantially affects interstate communications. Thus, the Second Circuit upheld FCC preemption where a state commission required a surcharge on certain interstate customers ranging up to 1600 percent higher

8. North Carolina Util. Comm'n v. FCC ("*North Carolina I*"), 537 F.2d 787, 793-794 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Util. Comm'n v. FCC ("*North Carolina II*"), 552 F.2d 1036, 1045-1047 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); California v. FCC, 567 F.2d 84, 87 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); Puerto Rico Tel. Co. v. FCC ("*Puerto Rico Tel. Co.*"), 553 F.2d 694, 699-700 (1st Cir. 1977); New York Tel. Co. v. FCC ("*New York Tel. Co.*"), 631 F.2d 1059, 1066 (2d Cir. 1980); Computer and Communications Industry Ass'n v. FCC ("*CCIA* v. *FCC*"), 693 F.2d 198, 215 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana Pub. Service Comm'n v. FCC, 461 U.S. 938 (1983); Fort Mill Tel. Co. v. FCC ("*Fort Mill Tel. Co.*"), 719 F.2d 89, 91 n. 6 (4th Cir. 1983); National Ass'n of Regulatory Utility Comm'rs v. FCC ("*NARUC* v. *FCC*"), 746 F.2d 1492, 1500 (D.C. Cir. 1984).

9. *North Carolina II*, 552 F.2d at 1047; CCIA v. FCC, 693 F.2d at 216 n. 99. *See* Houston, East and West Texas Ry. Co. v. United States, 234 U.S. 342 (1914). A broad reading of *Shreveport* was rejected by the Fourth Circuit in *North Carolina II*, 552 F.2d at 1047-1049. *See* discussion of *Shreveport* at 20, *infra*.

10. 693 F.2d at 216: "[T]he Act itself does not distinguish between authority over rates and authority over other aspects of communications....[C]onflicting federal and state regulations regarding dual use CPE [Customer Premises Equipment] are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *[North Carolina] cases.*" Florida (Petition at 20) erroneously cites the *North Carolina* cases, with no page references, as having "determined that intrastate ratemaking was separable from and had no substantial effect on FCC jurisdiction." No such determination is contained in either of the *North Carolina* cases.

than the charge for comparable service to intrastate users. *New York Tel. Co.*, 631 F.2d at 1066.

Eighth, Subsection 221(b) of the Act has no application except to a "straddling" case, *i.e.*, where a metropolitan area extending across state boundaries is being regulated by the state(s) involved.[11]

The established preemption doctrine just discussed is simply left out of the Louisiana, California and Ohio submissions, while Florida (Petition at 3, 19-21) barely acknowledges its existence. Generally, the states reargue FCC preemption as if the important cases of the last two decades did not exist -- using perfunctory citations to these cases only for points of secondary significance.[12] The states paint a picture of a federal agency out of control, exceeding its statutory charter and going far beyond anything ever intended by Congress; but that picture depends on refusing to recognize numerous court decisions construing the statutory language and its underlying intent. The states' arguments, examined in light of the FCC preemption doctrine developed and applied by the courts, prove to be without merit.

III. Similarly, the states ignore Congressional acquiescence in the preemption doctrine applied by the courts.

The states generally ignore Congressional awareness of and involvement in the development of the FCC preemption doctrine applied by the courts. In 1976, responding to similar argumentation, the Fourth Circuit said:

11. *North Carolina I*, 537 F.2d at 795; *North Carolina II*, 552 F.2d at 1045; *Puerto Rico Tel. Co.*, 553 F.2d at 698-699; *New York Tel. Co.*, 631 F.2d at 1064; *CCIA* v. *FCC*, 693 F.2d at 216-217; *Fort Mill Tel. Co.*, 719 F.2d at 91 n. 6; *NARUC* v. *FCC*, 746 F.2d at 1500.

12. For example, Louisiana (Jurisdictional Statement at 24-25) cites *North Carolina II*, but only to support the statement that Congress sought to deny the FCC *Shreveport*-type jurisdiction over local rates (a point not contested); and (at 25-26) cites *CCIA* v. *FCC*, but only to indicate that a decision to deregulate terminal equipment was sustained because of the inseparability of interstate and intrastate usage.

> Congress cannot have been unaware that for some 30 years FCC has viewed and treated section 2(b)(1) of the Act as imposing no bar to its exercise of jurisdiction over facilities used in connection with both intrastate and interstate telephone communications.[13]

Since 1976, the telephone industry has been entirely restructured along competitive lines. A key factor in this restructuring was preemptive FCC decision-making upheld by the courts. *See* note 8, *supra*. Even more emphatically today than in 1976, it must be said that Congress cannot have been unaware of these developments. As pointed out in Judge Bork's recent Opinion in *NARUC* v. *FCC*, in the District of Columbia Circuit:

> Congress has obviously been aware that for nearly forty years the Commission has claimed jurisdiction over some intrastate facilities. Congressional acquiescence in these claims is symbolized by the Joint Federal-State Board procedure of section 410(c). Congress would not have created this procedure in 1971 if it had been concerned that the FCC was inappropriately exercising jurisdiction over matters committed to state regulation. The Joint Board procedure actually augmented the Commission's powers in part by recognizing national primacy.

746 F.2d at 1500, citing *North Carolina I*, 537 F.2d at 795.[14]

13. 537 F.2d at 795, citing (at 794-795) Use of Recording Devices, 11 F.C.C. 1033 (1947); Katz v. AT&T, 43 F.C.C. 1328, 1331-1332 (1953); Jordaphone Corp. of America v. AT&T, 18 F.C.C. 644 (1954); AT&T TWX, 38 F.C.C. 1127 (1965); and Department of Defense v. AT&T, 38 F.C.C. 2d 819 (1970). It is 46 years since the FCC, over the objections of NARUC, asserted Section 214 jurisdiction over facilities entirely within a single state but carrying some traffic of interstate character. Southwestern Bell Tel. Co., 6 F.C.C. 529 (1938).

14. Continuously since 1977, pending before Congress and receiving active consideration were bills that addressed the jurisdictional division between federal and state regulation of telecommunications. *See* for example: H.R. 13015 (95th Cong; 2d Sess.), § 102; S. 2827 (96th Cong.; 1st Sess.), § 103; H.R. 6121 (96th Cong.; 1st Sess.), § 211; S. 1660 and H.R. 3621 (98th Cong.; 1st Sess.), §§ 4, 5, 8 and 9; H.R. 4102 (98th Cong.; 1st Sess.), § 4; S. 898 (97th Cong.; 1st Sess.), § 103. Through the testimony of scores of witnesses, Congress had full knowledge of the preemption doctrine created by the foregoing decisions and of the consequences of this doctrine, but took no action to reverse the

Thus, as two Circuits have stressed, there has been clear Congressional acquiescence in the preemption doctrine applied by the courts. This doctrine is the kind of "reasonable accommodation of conflicting policies... that Congress would have [has] sanctioned" which this Court has said repeatedly it will not disturb:

> If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Capital Cities, 104 S.Ct. at 2700, *quoting Fidelity Federal Savings and Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982), which quoted *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

Finally, if any doubt remained of Congressional acquiescence in the preemption doctrine applied by the courts, Florida (Petition at 13-14) eliminates that doubt by quoting a report adopted in 1984 by the House of Representatives and substantially adopted by the Senate. Florida uses selective emphasis (but without indicating the emphasis is not in the original) to suggest Congressional disapproval, but the words of the report say expressly that the Committee "does not intend to depart from those [court] interpretations" and limit the effect of Subsection 2(b) to "services that are exclusively local or intrastate in nature":

> The Committee recognizes that the application of Section 2(b) [of the Communications Act] is a complex matter with a long history of interpretation by the courts. The

tide. What relevant action Congress has taken since 1934 maintained FCC jurisdiction, or even increased its extent. *See* (i) the 1943 Amendment, modifications to 47 U.S.C. § 214(a), Act of March 6, 1943, 57 Stat. 11, and the FCC's interpretation, AT&T Co., 10 F.C.C. 315, 318-321 (1944); (ii) the 1954 Amendment, Act of April 27, 1954, modifying 47 U.S.C. §§ 152(b), 153(e) and 221(b), 68 Stat. 63-64; (iii) modifications to 47 U.S.C. § 410 in 1956, Act of August 2, 1956, 70 Stat. 932, and in 1971, P.L. 92-131, 85 Stat. 363; and (iv) the 1982 Amendment, P.L. 97-259, amending 47 U.S.C. § 301, 96 Stat. 1091.

> Committee does not intend to depart from those interpretations in observing that Section 2(b) denies the FCC the authority to regulate common carrier communication services that are exclusively local or intrastate in nature. Section 2(b) does not, however, detract from the FCC's jurisdiction over common carrier communications services that are interstate in character.

The Committee went on to endorse the preemption doctrine established by agency and court decision:

> In particular, [Section 2(b)] does not bar the FCC from regulating such services which are provided over facilities that also carry intrastate common carrier communications. Under Section 2(b) the FCC is barred from regulating those local common carrier services which the states may regulate without infringing upon Federal regulatory authority over rates and terms under which interstate common carrier services are provided.

H. REP. No. 98-934, 98th Cong., 2d Sess. 62 (1984). *See* 130 CONG. REC. 14,285 (1984) and 130 CONG. REC. 12,235 (1984).

The quoted language of the Congressional report reinforces the point stressed by the Fourth and D.C. Circuits as quoted *supra* at 7-8: Congress, with full knowledge, has acquiesced in the preemption doctrine that the states refuse to recognize.

IV. The FCC's carefully limited preemption comes squarely within its established preemptive authority.

The FCC's carefully limited preemptive action raises none of the difficult questions at issue in the various preemption cases discussed *supra* at 5-7. Here there is no need to examine the interstices of the Act for authority, no requirement for an ancillary theory; the fixing of depreciation rates and methodology is one of the FCC's assigned tasks under Title II. The only issue is whether the states may take action that would negate, as a practical matter, the effect of the FCC's discharge of its statutory responsibilities.

After long and careful study of depreciation, the FCC concluded that profound changes in telecommunications require a fresh approach, focussed not on holding down depreciation accruals at all costs but on assuring full and timely capital recovery in the interests of ratepayers as well as investors.[15] Timely capital recovery would "result in faster technological innovation with its accompanying benefits."[16] But "improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital."[17] The Commission acted to promote "a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices." The agency recognized that, in the new competitive environment, using proper depreciation methods and rates "is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of the competition to the ratepayers of this country."[18]

In view of these critical concerns, after some reluctance,[19] the FCC concluded its depreciation prescriptions under Subsection 220(b) must be effective in achieving full and timely capital recovery; and this means the states must be bound by FCC prescriptions. These conclusions were reached by the expert agency based not only on its general expertise but on years of close

15. Property Depreciation, 83 F.C.C.2d 267, 280-281 (1980), *reconsideration denied*, 87 F.C.C.2d 916 (1981).

16. *1983 Preemption Order*, 92 F.C.C.2d at 876, App. at A-45.

17. *Id.* at 877, App. at A-46.

18. *Id.* at 877 and 874, App. at A-46 and A-41.

19. Initially, while stressing its power to preempt state actions that might interfere with or tend to frustrate policies or rules the FCC had adopted to carry out statutory objectives, the Commission decided against preempting the states. Amendment of Part 31, 89 F.C.C.2d 1094, 1108 (1982), App. at A-61, A-84. Some months later, in light of unexpected variance by the states from FCC prescriptions (*1983 Preemption Order*, 92 F.C.C.2d at 877 n. 14, App. at A-46), the Commission closely examined the terms of Section 220 and the legislative history of the Act, as well as the need for a policy effective nationwide, and concluded the states must be preempted. *Id.* at 879-880, App. at A-49 and A-50.

examination of the subject and awareness of the new environment the FCC was helping to create.[20]

The Commission's consideration of these matters was directed not merely to the performance of accounting procedures; it was focussed on the *actual recovery of investor capital* -- in the interests of both ratepayers and investors. Thus, the Commission considered the risk to ratepayers of inadequate capital recovery, with ratepayers likely to bear the burden of any depreciation reserve deficiency under *Democratic Central Committee* v. *Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied sub nom. D.C. Transit System, Inc.* v. *Democratic Central Committee*, 415 U.S. 935 (1974). *See Property Depreciation*, 83 F.C.C.2d at 280-281. Taking this into account, the Commission recognized the need for a reform of prior regulatory practices and proceeded to implement this reform. The essence of the Commission's *1983 Preemption Order* was that the states would not be permitted to negate the FCC's policies by denying effective capital recovery in accordance with FCC prescriptions.[21]

20. The FCC's Docket No. 20188 involved an exhaustive study of depreciation over a seven-year period. It included thousands of pages of submissions by industry and state commissions, among others; a special study by Ernst & Ernst, Inc. commissioned by the FCC; and a review of the entire subject of depreciation by Commission staff reflected in a "Primer" made part of the record. Further, the Commission, sitting *en banc*, heard presentations by Commission staff as well as industry spokesmen stressing the critical importance of depreciation in the new environment of telecommunications. Similarly, in its CC Docket No. 79-105, extensive Commission resources were dedicated, over a period of several years, to reviewing the issues in light of more thousands of pages of submissions, again including submissions by state commissions. With active participation by Commissioners, this led first to the Commission's expensing and amortization program for station connections (First Report and Order, 85 F.C.C.2d 818 (1981)); then to the *1983 Preemption Order*. It would be difficult to conceive of an agency conducting a more thorough examination of a subject.

21. The states confuse accounting matters, governed by Subsection 220(a) of the Act, and depreciation, governed by Subsection 220(b). *See* for example Louisiana (Jurisdictional Statement at 10-12). The FCC's direct assertion of preemptive power applies only to depreciation prescriptions and the related accounting under Subsection 220(b). *1983 Preemption Order*, 92 F.C.C. 2d at 870, 873 and 874, 878, App. at A-33, A-39, A-41 and A-42, A-48.

On appeal, the Fourth Circuit found that the FCC's action comes squarely within the Commission's established preemptive authority. *VSCC*, 737 F.2d at 389-390, App. at A-2. Applying the foregoing legal principles, and giving special emphasis to the analysis contained in *Fidelity Federal Savings & Loan Co.* v. *de la Cuesta*, 458 U.S. 141 (1982), the court below found first that the FCC intended to preempt; and then that the FCC's action was "within its authority to ensure efficient operation of the interstate telephone network." *VSCC* at 393, 394, App. at A-11. The Fourth Circuit stressed the guiding principle enunciated by then-Judge Burger in *General Telephone Co. of California* v. *FCC*, *supra* note 6, 413 F.2d at 398, that "[t]he Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole." *VSCC* at 396, App. A-17. Finally, the court below reached the following conclusions:

> [I]t cannot be said that depreciation policies are "separable from" interstate communications. Indeed, the conduct and development of interstate communications would undoubtedly be affected by the states' imposition of depreciation policies that slowed capital recovery and innovation.

Id. at 395, App. A-15.

Thus, the Fourth Circuit applied the key two-pronged test established by the cases. *See* note 8 *supra* and accompanying text. The FCC's decision to preempt the states on depreciation was held to satisfy both prongs, in that: (i) depreciation policies could not be shown to be separable from interstate communications, and (ii) depreciation policies would undoubtedly affect the conduct and development of interstate communications.

Both Commission and reviewing court understood, as did the Congress in 1934,[22] that the same facilities and the same systems

22. The two bills introduced in Congress in February 1934, S. 2910 and H.R. 8301, contained the following rather simplistic limitation on the new federal agency's jurisdiction:

> SEC. 210. Nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges,

provide both interstate and intrastate service. If a state commission refuses to permit a carrier to recover its capital, this refusal will damage the interests of the interstate customer who is dependent on systems employed for both inter- and intrastate purposes. This recognition leads inexorably to the conclusions of the Commission and the Fourth Circuit that depreciation policies are *not* "separable" from interstate communications, and that misguided depreciation policies at the state level *will* adversely affect interstate communications.These rational and well-supported conclusions of the agency and the Fourth Circuit satisfy the relevant legal standards.

How do the states deal with the two-pronged test? Louisiana, California and Ohio never acknowledge the existence of the test applied by four Circuits in eight decisions (*supra* note 8), and Florida (Petition at 13-14) misapplies the test. No serious effort is made by any of the states to show that their position is in harmony with the test. The states fail the test by refusing even to recognize it as an effective standard.

In summary, the decisions of the FCC and the Fourth Circuit come squarely within the cases, meeting all the relevant tests established by Circuit courts and by this Court.

V. The FCC's preemptive action here is a faithful implementation of explicit Congressional intent.

In addition to, and reinforcing, the foregoing analysis, there are specific provisions in the Communications Act showing that the

> classifications, practices, or regulations for or in connection with intrastate communication service of any carrier, or to any carrier engaged exclusively in intrastate commerce.

This provision was replaced by the more sophisticated provisions of Subsection 2(b) of the Act, 47 U.S.C. § 152(b), which applied a limited regulatory scheme to carriers engaged in interstate (and foreign) communications solely through the facilities of non-affiliates. While "almost all telecommunications facilities are physically intrastate," the telephone companies of the United States interconnected with the national communications network employ these facilities to furnish interstate service, and to the degree they do so, these companies are subject to FCC jurisdiction. *See NARUC* v. *FCC*, 746 F.2d at 1498-1500 and cases cited therein.

1934 Congress intended federal primacy for the FCC's depreciation prescriptions. In 1934, Congress (i) granted to the FCC in express terms preemptive responsibility and power over depreciation, and (ii) rejected NARUC and state arguments for a reservation to the states of power over depreciation. Thus, after a careful study of the Communications Act and its legislative history,[23] the Commission properly concluded Congress specifically intended that FCC depreciation prescriptions would preempt the states.[24] The Commission's conclusion is supported by the following findings:

(1) The language of Section 220 of the Communications Act grants preemptive power to the FCC in respect of depreciation. *1983 Preemption Order*, 92 F.C.C.2d at 869-870, App. at A-33.

(2) Congress rejected the version of Subsection 220(j) endorsed by NARUC in 1934; this rejected version would have reserved to the states the power to prescribe depreciation methodology or rates for intrastate purposes.[25]

23. In the interpretation of its statutory charter, the conclusions of the expert agency carry special weight. The agency's construction need not be the only reasonable one, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Udall v. Tallman, 380 U.S. 1, 16 (1965); Federal Elec. Comm'n v. Democratic Senatorial Campaign, 454 U.S. 27, 39 (1981). "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." FCC v. WNCN Listeners Guild, 450 U.S. 582, 598 (1981). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

24. *1983 Preemption Order*, 92 F.C.C.2d at 873, App. at A-39. The Fourth Circuit found it unnecessary to decide whether 47 U.S.C. § 220 itself requires preemption. *VSCC*, 737 F.2d at 392, App. at A-8. Ohio (Petition at 8, 10) mischaracterizes the Fourth Circuit's decision not to reach the question as a finding of "an explicit congressional intent not to preempt...."

25. The NARUC-sponsored version of Subsection 220(j) read as follows:

> Nothing in this section shall (1) limit the power of the State commission to prescribe, for the purpose of the exercise of its jurisdiction with respect to any carrier, the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices, or (2) relieve

(3) Committee reports accompanying the bills passed in 1934 contained language indicating that the committees believed the provision of the Interstate Commerce Act (ICA) corresponding to Section 220 of the Communications Act preempted the states in relation to depreciation prescriptions. Further support for the conclusion that the ICA preempted the states on depreciation included statements on the House floor by Chairman Rayburn, sponsor of the House bill. *Id.* at 871-872, App. at A-36 and A-37. Thus, the 1934 Congress, recognizing the preemptive power of the federal agency regarding depreciation under the ICA, adopted provisions closely following the key ICA provisions. *Id.* at 872-873, App. at A-38.[26]

(4) Accordingly, the legislative history "supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier." *Id.* at 873, App. at A-39.

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any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State law.

26. The Commission found that Congress settled on the provisions of Section 220 with the Congressional committees "believ[ing] that the predecessor provision of the Interstate Commerce Act had preempted the states." *1983 Preemption Order*, 92 F.C.C.2d at 871-872, App. at A-36 and A-37. As explained *supra*, Congress in 1934 rejected the NARUC-sponsored version of Subsection 220(j) reserving power to the states in favor of the present Subsection 220(j) calling on the FCC to investigate and report to Congress. The 1934 Congress also created new provisions in Subsection 220(h) (power to prescribe differently for different classes of carriers or except different classes from requirements) and in Subsection 220(i) (notification to the states and opportunity for the states to present views). In other respects, Section 220 as adopted closely tracks corresponding provisions of what was then ICA Section 20. *Compare* APPENDIX 3 and APPENDIX 4. The key wording of Subsection 220(b), following almost *verbatim* ICA § 20(5) [later 49 U.S.C. § 20(4)], reads: "The Commission shall...prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged....*Such carriers shall not...charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or...charge...a percentage of depreciation other than that prescribed therefor by the Commission.*" (Emphasis added.)

In summary, the issue of depreciation preemption was specifically considered by the Congress in 1934. As concluded by the expert agency after careful review, the wording of the Act, supported by its legislative history, makes it clear that the conclusion reached by the 1934 Congress was the same as that reached by the FCC and the Fourth Circuit today: efficient operation of a national communications system precludes a reservation to the states of the power to fix depreciation in conflict with FCC depreciation prescriptions.

VI. When examined in light of the foregoing analysis, the remaining arguments of the states disintegrate.

The states present a number of arguments that do not survive review in light of the foregoing analysis. For example, the following interrelated arguments are stated in one form or another by the various states:

A. Arguments based on a narrow reading of the "interstate" concept in conflict with principles established by this Court. *See* for example Ohio (Petition at 10-14); Florida (Petition at 14.)

B. Arguments based on application of Subsections 2(b) and 221(b) of the Communications Act in conflict with the preemption doctrine applied by the courts.

C. Arguments based on the claim that the Congress in 1934 denied the FCC preemptive power with respect to depreciation.

D. Anxious hypotheticals -- arguing against possible further preemptive actions.

These arguments are illustrated where Louisiana (Jurisdictional Statement at 7-8, 19-20, 23-24, 27, 29), California (Petition at 2-3, 9, 12, 14-15) and Ohio (Petition at 2-3, 8-10, 12-14) cite and discuss Subsections 2(b) and 221(b) without even acknowledging judicial interpretation of these provisions. *See* notes 8 and 11, *supra*, and associated text. Similarly, Section 410 is cited by Louisiana (Jurisdictional Statement at 25-26) without

acknowledging the two Circuits that found in the history of this section indications of Congressional approval of FCC preemptive action. *See NARUC* v. *FCC*, 746 F.2d at 1500; *North Carolina I*, 537 F.2d at 795. And yet the notion that these same provisions of the statute prohibit FCC preemption of depreciation permeates the states' argumentation. *See* for example Ohio (Petition at 17), California (Petition at 12-15), Louisiana (Jurisdictional Statement at 23-27), Florida (Petition at 8-17, 19-21).

These states insist that the 1934 Congress decided against FCC preemptive power affecting depreciation; but their argument depends on ignoring inconvenient judicial construction of the statute and its legislative history under which the states' theory is untenable. The courts have rejected time and again the states' interpretation of Subsections 2(b) and 221(b) and Section 410. *See* notes 8 and 11, *supra*. The states' discredited interpretation of these provisions cannot support their arguments that these very provisions prohibit FCC preemption of depreciation -- particularly in the teeth of the expert agency's conclusion that Congress specifically intended FCC depreciation prescriptions to preempt inconsistent state action.

Having attempted to make the statute read as if the 1934 Congress had adopted the NARUC-sponsored version of Subsection 220(j), instead of rejecting it, the states then offer the unarguable proposition that it is for Congress to modify the Communications Act. *See* for example California (Petition at 14-16) and Ohio (Petition at 14). But no rewrite of the Act is necessary to support the FCC's action here -- an action that carries out those responsibilities specifically assigned by Congress in Subsection 220(b) and discharges those broad statutory responsibilities to act in the public interest stressed by the courts time and again.

In *Southwestern Cable*, 392 U.S. at 177, this Court quoted *Permian Basin*, 390 U.S. at 780:

> [W]e may not, "in the absence of compelling evidence that such was Congress' intention ... prohibit administrative action imperative for the achievement of an agency's ultimate purposes."

The Commission's action here was not only deemed by the Fourth Circuit and the FCC to be "imperative for the achievement of an agency's ultimate purpose"; it was also found by the expert agency to be specifically directed by Congress in order to give practical effect to one of the Commission's statutory assignments. *A fortiori*, then, the FCC's preemption is well within the agency's jurisdiction, and conflicting state action must yield to federal primacy.

The courts have interpreted the relevant terms of the Act numerous times in the last dozen years. No court has adopted the states' version of the jurisdictional scheme of the Act or accepted their various arguments dependent on that version.[27] As stressed recently by Judge Bork in rejecting still another state challenge to the established interpretation of the Communications Act:

> If the Act's goal of providing uniform, efficient service is ever to be realized, the Commission must be free to strike down the costly and inefficient burdens on interstate communications which are sometimes imposed by state regulation.

NARUC v. *FCC*, 746 F.2d at 1501. Impediments created by the states that " 'substantially affect' both the conduct and development of interstate communications" and that "infringe on the FCC's jurisdiction over interstate calls and offend the very purposes of the Communications Act which seeks to create a 'rapid, efficient, Nation-wide . . . communications service' " will be preempted. *Id.*

The states' refusal to recognize established legal standards governing FCC preemption leads to anxious hypotheticals —

27. Florida (Petition at 18-19) erroneously says the court in NARUC v. FCC, 533 F.2d 601 (D.C. Cir. 1976), applied Subsection 2(b). Of the three judges on the panel, only Judge Wilkey found Subsection 2(b) applicable. Judge Wright dissented, and Judge Lombard (concurring) found it unnecessary to reach the Subsection 2(b) question (at 622). Florida (Petition at 17-18) also claims to find support for its arguments in FCC v. Midwest Video Corp., 440 U.S. 689 (1979) -- a case that did not involve Subsections 2(b) and 221(b). The Court will strike down FCC action in conflict with limitations contained in the Act; but there is no such conflict between these provisions as construed by the courts and the FCC's preemption here.

preemptive actions that the states think the FCC might take some day. *See* for example Louisiana (Jurisdictional Statement at 22), Florida (Petition at 9-11), California (Petition at 9-12), Ohio (Petition at 7, 15-19); and *see* Maine (*amicus* brief at 2), arguing that the Commission's preemption is "tantamount to the reinstatement of the *Shreveport* doctrine. . . ."

But the preemptive action at issue here was carefully limited and based on a record and findings that justify that action by satisfying standards carefully articulated by the courts. The Commission's action bears no resemblance to what was at issue in the *Shreveport Rate Case*, where the Interstate Commerce Commission (ICC) required the adjustment of rates set by a Texas commission so as to prevent undercutting rates regulated by the ICC. *See* discussion in *North Carolina II*, 552 F.2d at 1047. There is no question here of action imposing an alignment of rates regulated by the states with those regulated by the federal agency. The FCC is merely doing what it was directed to do by Congress: prescribing depreciation methodology and rates. The ratemaking process is undisturbed at the state level except that, as Congress intended, the states may not deprive the FCC's depreciation prescriptions of practical effect.

The states' speculations about possible preemptive action in the future do not invalidate the limited preemption now under consideration. In any event, whatever future preemption occurs will be subjected to the same careful scrutiny and the same legal principles. The courts have *not* created a game without rules. The states' alarm results from their refusal to recognize the rules, *i.e.*, those limits established by the courts -- limits correctly applied in the case of depreciation preemption.

In summary, the arguments presented by the states seek to reargue points of law well settled in an FCC context. The states' consistent failure to recognize established law is testimony to their desperate position. When the states' claims are reviewed in light of established legal principles, these claims simply disintegrate, leaving no reason for plenary review by this Court.

CONCLUSION:

THE COURT SHOULD DENY REVIEW.

The carefully limited preemption here at issue comes squarely within the legal standards applied to FCC preemption by Circuit courts and by this Court. The states, refusing even to recognize these standards, have failed to meet the relevant tests. Further, as an implementation of explicit Congressional intent, the FCC's *1983 Preemption Order* should prevail.

Accordingly, the agency acted within the scope of its authority and rationally exercised its expert judgment when it concluded (a) that its depreciation policies and rates preempt inconsistent state depreciation policies and rates, and (b) that telephone plant used for both interstate and intrastate communication must be depreciated in accordance with FCC prescriptions.

There having been no showing that plenary consideration is justified, the Court should deny review.

Respectfully submitted,

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March 18, 1985

APPENDIX 1

LISTING OF THE GTE COMPANIES IN COMPLIANCE WITH RULE 28.1

In compliance with the Court's Rule 28.1, following is a listing of the parent company and all subsidiaries or affiliates of GTE Service Corporation and its affiliated domestic telephone operating companies:

GTE CORPORATION
- GTE Service Corporation
- GTE Investment Management Corporation
- GTE Realty Corporation
  - City Center Hotel Corporation
  - GTE Realty Corporation of Connecticut
- GTE Shareholder Services Incorporated
- GTE Reinsurance Company Limited
- GTE Insurance Company Limited
- GTE SPRINT COMMUNICATIONS CORPORATION
  - GTE Sprint Communications Corporation of Virginia
  - GTE Sprint Redevelopment Corporation
  - Video Microwave, Inc.
- GTE SPACENET CORPORATION
- GTE SATELLITE CORPORATION
- GTE TELENET INCORPORATED
  - GTE Support Services Incorporated
  - GTE TELENET HOLDING CORPORATION
    - Cambridge Telecommunications Corporation
    - GTE Telenet Communications Corporation
- GTE PRODUCTS OF CONNECTICUT CORPORATION
  - GTE COMMUNICATIONS SYSTEMS CORPORATION
    - GTE Communication Systems-Asia Incorporated
    - GTE Telecomp de Juarez, S.A. de C.V.

GOVERNMENT SYSTEMS CORPORATION
- GTE International Systems Corporation
- GTE Microcircuits (Taiwan) Limited
- Syltec International Incorporated
- Sylvania Technical Systems, Inc.

GTE INTERNATIONAL INCORPORATED
- Advance Industries Argentina S.A.I.C.
- Automatic Electric do Brasil, S.A.
- Claude S.A.
  - Arlux S.A.
  - Claude Benelux S.A.
  - Societe B.A.G. et Compagnie
  - Societe B.A.G. S.A.R.L.
  - Societe des Etablissements Legourd et Compagnie
  - Societe des Etablissements Legourd S.A.R.L.
- Compania General de Telefonia y Electronica, S.A.
- GTE ATEA N.V. - S.A.
- GTE Australia Pty. Limited
  - GTE New Zealand Limited
- GTE Consumer Electronics AG
- GTE de Colombia S.A.
- GTE del Peru S.A.
- GTE do Brasil S.A. Industria e Comercio
  - Servi-Empire Assistencia Tecnica de Radio e Televisao S.A.
- GTE Electronica, S.A.
- GTE Export Corporation
  - GTE de Panama, S.A.
  - GTE International Incorporated Limitada
  - GTE Sylvania S.A. (Costa Rica)
  - GTE Sylvania S.A. de C.V. (El Salvador)
  - GTE Sylvania S.A. (Guatemala)
  - GTE Sylvania S.A. (Honduras)
  - GTE Sylvania S.A. (Nicaragua)
- GTE Far East (Services) Limited

- GTE Industries Incorporated
- GTE International Investment Company Ltd.
- GTE International Limited
- GTE Iran Incorporated
- GTE Overseas Corporation
- GTE Precision Materials (France)
- GTE Sistemas de Informacao Ltda.
- GTE S.A.
- GTE Sylvania AB (Sweden)
- G.T.E. Sylvania, Greek Commercial Corporation for Electric Lamps
- GTE Sylvania A/S (Denmark)
- GTE Sylvania A/S (Norway)
- GTE Sylvania N.V. (Belgium)
- GTE Sylvania S.A. (Switzerland)
- GTE Sylvania, S.A. de C.V. (Mexico)
- GTE Sylvania S.A.R.L. (France)
- GTE Sylvania S.A. Electronica, Quimica, Industrial y Comercial (Argentina)
- GTE Sylvania Canada Limited
  - CEB Limited
  - Electrolier Corporation
  - G.T.E. Sylvania Canada Corporation
  - Iberville Fittings Limited
    - Cenal Foundry Ltd.
- GTE Sylvania Gesellschaft m.b.H.
- GTE Sylvania Licht GmbH
- GTE Sylvania Limited (Hong Kong)
- GTE Sylvania (UK) Limited
  - Endura Viking Lamps Limited
  - GTE Products (UK) Limited
  - GTE Sylvania Limited (England)
  - GTE Sylvania (GB) Limited
  - GTE Unistrut Limited
- GTE Taiwan Telecommunications Ltd.

GTE Telecommunications Incorporated
GTE Telecomunicazioni S.p.A.
Kondo Sylvania Limited
Radiac Corporation
S.A. GTE
Sylvania Electronica Limitada
The Microexchange Corporation
Zinsco de Venezuela, C.A.

GTE PRODUCTS CORPORATION
Chace Precision Materials Corporation
Chace Specialty Metals, Inc.
Colonial Merchandising Corporation
Commonwealth Manufacturing Corporation
Gibson Electric of Puerto Rico, Inc.
GTE Leasing Corporation
Kalama Grain Terminal, Inc.
GTE Sylvania Wiring Devices Incorporated
GTE Transport Incorporated
GTE Unistrut (Europa) B. V.
Lamparas Especiales de Mexico, S.A. de C.V.
Syltron, Inc.
Sylvania Componentes Electronicos, S.A.
Sylvania Connector Products, Inc.
Sylvania Lighting Company
Sylvania Lighting Services Corp.
Sylvania Overseas Trading Corporation
Sylvania Realty Corporation
Sylvania Special Products, Inc.
Televac, Inc.
West Indies Realty Company

GTE VALERON CORPORATION
Valenite-Modco (Australia) Pty. Limited
Valenite-Modco S.A.
Valenite-Industria e Comercio, Ltda.

Valenite-Modco Limited
Valeron Limited
Valdiamant AB
Valenite-Modco SARL
Valdiamant International GmbH
Valenite-Modco S.p.A.
Valenite-Modco International, Inc.
Nippon Valenite-Modco K.K.
Valenite-Modco (Proprietary) Limited
Valenite-Modco (U.K.) Limited
Valeron-Modco Pacific Co., Ltd.
Valenite-Modco Caribe, Inc.
Valeron International, Inc.
Valeron-Europe, Ltd.
Valeron-Modco PTE, Ltd.
GTE LABORATORIES INCORPORATED
GTE FINANCE N.V.
GTE Export Factoring Company B.V.

GENERAL TELEPHONE COMPANY OF CALIFORNIA
GENERAL TELEPHONE COMPANY OF FLORIDA
GENERAL TELEPHONE COMPANY OF KENTUCKY
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST
HAWAIIAN TELEPHONE COMPANY
The Micronesian Telecommunications Corporation
BETHEL AND MT. AETNA TELEPHONE AND TELEGRAPH COMPANY
GARRETT TELEPHONE CO., INC.
GENERAL TELEPHONE COMPANY OF ILLINOIS
GENERAL TELEPHONE COMPANY OF INDIANA, INC.

Appendix 1

GENERAL TELEPHONE COMPANY OF MICHIGAN
GENERAL TELEPHONE COMPANY OF THE MIDWEST
GENERAL TELEPHONE COMPANY OF OHIO
GENERAL TELEPHONE COMPANY OF PENNSYLVANIA
GENERAL TELEPHONE COMPANY OF WISCONSIN
GTW Telephone Systems Incorporated
GENERAL TELEPHONE COMPANY OF ALASKA
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.
West Coast Telephone Company of California

Appendix 2

EXCERPTS FROM THE RECORD OF THE FCC'S CC DOCKET NO. 79-105

FIRST EXCERPT

From Petition for Declaratory Ruling of General Telephone Company of Ohio filed June 7, 1982, pages 6-7 and Exhibit "E":

> 11. The use of different depreciation rates for the interstate portion of General's plant accounts than for the intrastate portion will not achieve one hundred percent capital recovery, except by sheer and remote chance, even if the "books" for each jurisdiction reflect full capital recovery. The reason for this is that jurisdictional allocation factors are continually changing. Attached hereto as Exhibit E is an analysis illustrating this fact. Moreover, in this situation there continues to exist a possibility of "stranded investment" -- i.e., a residue of investment dollars remaining in rate base long after retirement of the related asset. In fact, "stranded investment" may remain in rate base in perpetuity if a remaining life adjustment is never made. In Docket No. 20188 this Commission sought to avoid "stranded investment." *See* 83 FCC 2d at 288, 289.

EXHIBIT "E"

THE EFFECT OF DIFFERENT JURISDICTIONAL DEPRECIATION RATES IN THE PRESENCE OF CHANGING JURISDICTIONAL ALLOCATION FACTORS IS TO PREVENT 100% CAPITAL RECOVERY

The attached examples show that the use of different depreciation methodologies for the interstate and intrastate portions of General's plant accounts will not achieve the objective of one hundred percent capital recovery -- no more and no less -- except by sheer and remote chance. This is because jurisdictional allocation factors are based on changing usage studies (of both holding times and message volumes) and are revised monthly. Investment and expenses, including depreciation, allocated to interstate and intrastate services, change monthly for purposes of jurisdictional separations and settlements as a result of usage changes. The use of different depreciation rates for interstate and intrastate purposes will mean either (i) that General will *never realize* full capital recovery, or (ii) General will realize an *over-recovery*. In either case, the ratepayer will be disserved.

To illustrate the effect of changing jurisdictional allocation factors, Schedule E-1 and Schedule E-2 set forth a Single Asset Example with two variations in the separations factors over four years.

As shown in Schedule E-1, on an original investment of $100, General would recover only $98.75, resulting in failure *ever* to recover $1.25, constituting 1.25% of the original investment -- even though both the interstate and intrastate "books" would indicate full capital recovery.

Conversely, as shown in Schedule E-2, on an original investment of $100, General would recover $101, for a $1 over-recovery, even though both sets of "books" would indicate nothing more than full capital recovery.

These illustrations are intended to frame the problem in simplified, understandable terms. The conflict between FCC prescriptions of depreciation methodologies and rates and state determinations must necessarily result in destroying any assurance that the depreciation process will be allowed to work as intended, providing recovery of just the amount invested, not more, not less.

* * * * *

SECOND EXCERPT

From Joint Petition for Clarification filed June 8, 1982 of GTE Service Corporation and its affiliated domestic telephone companies; United Telephone System, Inc., on behalf of the companies comprising the United Telephone System; and Continental Telecom Inc., on behalf of its telephone operating companies; at 17-18:

> As reflected in the GTE Ohio company's petition, there is a differential between federal and state prescriptions exceeding $7 million in depreciation charges for the first year of rate implementation. Not only does this mean that our Ohio company will not realize timely capital recovery, as the FCC intended in adopting its Docket 20188 policies and in issuing its prescriptive decisions under § 220(b) of the Act; it could mean that the Ohio company, caught between federal and state sovereigns, may be denied full recovery of invested capital. Either of these results would frustrate the Commission's policies adopted to implement its statutory mandate, and would violate the basic principles of equity and fairness which have governed federal/state regulation of carriers involved in providing both interstate and intrastate service. [Footnote citing *Smith* v. *Illinois Bell Tel. Co., supra.*]
>
> As a practical matter, the same piece of property cannot be depreciated successfully at two different rates. Under modern accounting methods, units of equipment are

placed in groups. The costs represented by these groups are then allocated between interstate and intrastate jurisdictions. These allocations may change month to month, depending on measured jurisdictional use of the property in question. Given these circumstances, it is virtually inevitable that capital will be recovered more slowly or more quickly than one rate or the other calls for. If the intrastate ratepayer contributes too much, the interstate customer will give too little, and *vice versa*.

This impossibility of successful depreciation -- that is, recovery of exactly the capital invested except by sheer coincidence -- suggests that dual depreciation rates are not feasible and that a single rate should be used. If the Commission believes that the rates it approves, based on carefully-developed federal policies and rules, should be the prevailing ones, it has the legal power to accomplish this.[16]

* * * * *

16. In the *North Carolina* cases cited in ¶37 of the Reconsideration Order, and in the *Computer II* decision of the FCC, 84 F.C.C.2d 50, 104, the essential indivisibility of the interstate and intrastate uses of telephone equipment was crucial to the legal outcome. Similarly here, despite the artificial attribution of property to intrastate and interstate jurisdictions, depreciation necessarily is a unitary process. The property cannot be divided successfully.

APPENDIX 3

RELEVANT PROVISIONS OF THE INTERSTATE COMMERCE ACT AS OF 1934

To the extent relevant, following are the provisions of Section 20 of the Interstate Commerce Act as they were in 1934:

* * * * *

(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may

employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act.

* * * * *

(6) In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

(7) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business or shall keep any other accounts, records, or memoranda than those precribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction to a fine of not less than one thousand dollars nor more than five

thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time, such books, papers, or documents shall be preserved.

APPENDIX 4

TEXT OF SECTION 220 OF THE COMMUNICATION ACT OF 1934*, 47 U.S.C. § 220

§ 220. Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the

* Section 220 has not been amended since 1934.

preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.